IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-803

VESCO & CO., INC.,

Petitioner,

vs.

INTERNATIONAL CONTROLS CORP.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR COMMON LAW WRIT OF CERTIORARI OR MANDAMUS

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Respondent, International Controls Corp. ("ICC"), respectfully prays that the petition for the issuance of a common law writ of certiorari or mandamus to review the order of the United States Court of Appeals for the Second Circuit, entered in this case on September 14, 1976 be denied.

Opinions Below

Petitioner Vesco & Co., Inc. ("Vesco & Co.") seeks, in effect, review of three orders: (a) the amended judgment of the United States District Court for the Southern District of New York dated May 26, 1976 (16a•); (b) an order of the United States Court of Appeals for the Second Circuit dated September 14, 1976 which granted ICC's motion to dismiss Vesco & Co's appeal from the May 26,

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• Reference to Petitioner's Appendix.

1976 amended judgment upon the ground that it had not been timely taken (1a); and (c) a further order of the United States Court of Appeals for the Second Circuit, also dated September 14, 1976, which denied Vesco & Co.'s motion for reconsideration of issues raised on a prior appeal to that Court (2a).

Statement of the Case

Background

On June 7, 1973 ICC commenced an action in the United States District Court for the Southern District of New York ("ICC Action") against a total of thirty-two defendants (including Robert L. Vesco ["Vesco"] and Vesco & Co. Twenty-two of said defendants had also been named as defendants in an action commenced in the same court by the Securities and Exchange Commission on November 27, 1972. The United States Court of Appeals for the Second Circuit in a decision on a prior appeal (*International Controls Corp.* v. *Vesco*, 490 F.2d 1334 [2d Cir. 1974]), cert. den. 417 U.S. 932 (1974), noted that the complaint in the SEC action alleged:

> "a scheme of extraordinary magnitude, deviousness, and ingenuity in violation primarily of the anti-fraud provisions of the Securities and Exchange Act of 1934 . . . [and] charged that Robert Vesco masterminded and, with his cohorts, implemented a plan involving the manipulation of the assets and securities of a number of corporations controlled by Vesco including ICC", 490 F.2d at 1338-39.

The complaint in the ICC Action contained eleven counts and alleged violations of the Securities Exchange Act of 1934, principally Section 10(b) and Rule 10b-5, and charged Vesco with fraud, self-dealing, waste of corporate assets and breach of fiduciary duty.

At the time it instituted the action, ICC also moved for a preliminary injunction enjoining Vesco & Co. from transferring certain assets, including 846,380 shares of ICC stock it held of record. The District Court's order granting such relief was affirmed by the Court of Appeals in the decision referred to above and, as indicated, Vesco & Co.'s petition to this Court for a writ of certiorari was denied.

The Default Judgment Against Vesco

On October 5, 1973 a default judgment was entered against Vesco who, after being served on July 30, 1973, failed to appear to answer the complaint.*

In accordance with the October 5, 1973 judgment, a partial inquest was held which resulted in the entry on July 12, 1974 of a judgment against Vesco for $2,422,466.72. Although notice of said inquest was sent to Vesco he did not appear in connection therewith. Instead, Vesco & Co. appeared and argued for the first time that it should be given the right to defend the action on Vesco's behalf on the merits. This contention was rejected by Judge Stewart and the inquest proceeded, Vesco & Co. participating throughout.

Throughout its petition, Vesco & Co. erroneously claims that Judge Stewart reneged on a promise to give Vesco & Co. a full hearing on the merits of ICC's claim against Vesco. As demonstrated hereinafter the only assurances given by Judge Stewart was that Vesco & Co. would be given a full hearing on the question of whether it was the alter ego of Vesco, thus permitting ICC to proceed against the assets of Vesco & Co., i.e. the 846,380 shares of ICC stock transferred to it by Vesco, in order to satisfy its judgment against Vesco. ICC had, from the inception, taken the position that it would seek to enforce any judgment against Vesco in this manner.

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* Vesco is presently residing in Costa Rica and has successfully resisted extradition attempts based upon outstanding indictments against him.

The Alter Ego Hearing

In response to ICC's motion for an order permitting it to so reach the assets of Vesco & Co., Judge Stewart promptly set down for a full hearing the issue of whether Vesco & Co. was merely an alter ego of Vesco. After holding such a hearing Judge Stewart entered a decision and order on August 22, 1975 (18a-24a) in which he upheld ICC's contentions and directed Vesco & Co. to deliver its ICC stock to a court appointed receiver. Vesco & Co. has, to date, failed to do this.

Vesco & Co.'s Appeal from the Alter Ego Determination

On May 13, 1976 the United States Court of Appeals for the Second Circuit rendered a decision on Vesco & Co.'s appeal from Judge Stewart's August 22, 1975 decision. (*International Controls Corp.* v. *Vesco,* 535 F.2d 742 (2d Cir. 1976)). In effect the court found that the default judgment entered on July 12, 1974 lacked the certification of finality required by Rule 54(b) of the Federal Rules of Civil Procedure and remanded the case to the district court with the instruction that the district court could enter a final judgment, with the appropriate Rule 54(b) certification, as to those claims for which further damages could not be proven but could not enter a final judgment as to those claims for which further damages could be proven* (535 F.2d at p. 749).

The Entry of the May 26, 1976 Amended Judgment

Immediately following the Court of Appeals' May 13, 1976 decision ICC moved before the district court for the

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* Vesco & Co. raised for the first time on its appeal from the August 22, 1975 decision the question relating to the amended complaint filed by ICC in October of 1973. Although the Court of Appeals did not expressly refer to that issue in its May 13, 1976 decision, we respectfully suggest that said argument had to have been considered and rejected by the Court of Appeals for, if the judgment is, as urged by Vesco & Co., "void and ineffective" (Petition, p. 19) there was no need to have said judgment certified as to finality.

entry of an amended judgment, *nunc pro tunc,* containing the Rule 54(b) certification. After hearing Vesco & Co. in opposition to that application, Judge Stewart signed and entered the amended judgment (16a-17a).

Vesco & Co.'s Attempt to Appeal from the May 26, 1976 Amended Judgment

Following the entry of the May 26, 1976 amended judgment, in response to letters addressed to the Court of Appeals by the attorneys for both Vesco & Co. and ICC, the Clerk of the Court of Appeals advised the parties that the prior appeal "is no longer before this court". This was on June 23, 1976, five days prior to the time that Vesco & Co. was required to file a Notice of Appeal from the May 26, 1976 amended judgment.

Although it was advised, in effect, that it would have to initiate a new appeal, Vesco & Co. waited until July 7, 1976 before filing its Notice of Appeal. Since no order extending the time for filing an appeal had been entered, the Court of Appeals did not have jurisdiction over the appeal and, in response to ICC's motion, entered an order of dismissal on September 14, 1976. At the same time the court also denied Vesco & Co.'s motion for reconsideration of the issues raised on the prior appeal, obviously deciding not to enlarge the 14 day requirement contained in Rule 40 of the Federal Rules of Appellate Procedure. Vesco & Co.'s motion for reconsideration was not made for approximately three months after the Court's May 13, 1976 decision.

Vesco & Co. also moved in the District Court for an order enlarging its time to file the Notice of Appeal—upon the ground of excusable neglect—and also for an order vacating and reentering the May 26, 1976 amended judgment. Both motions were denied by Judge Stewart in a decision dated October 27, 1976 (R1a-R8a*).

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* Reference is to Respondent's appendix.

Reasons for Denying Petition

Under Rule 30 of the Supreme Court Rules the issuance of an extraordinary writ under 28 U.S.C. § 1651(a) is a matter "of sound discretion sparingly exercised". We respectfully suggest that the instant case does not call for the issuance of such extraordinary relief. Stripped of its surplusage, the petition merely presents a situation where Vesco & Co., faced with the dismissal of its appeal from the District Court's May 26, 1976 amended judgment because it was not timely taken, was forced to make an untimely motion for reconsideration of issues presented on a prior appeal and now seek the intervention of this Court in light of the Court of Appeals' decision to deny such reconsideration.

I. There is no merit to Vesco & Co.'s protest that it has been treated unfairly.

Vesco & Co.'s entire argument—presented at pages 10-17 of its petition—that it has been treated unfairly is premised upon the assumption that it has a right to defend ICC's claim against Vesco on the merits and its erroneous argument that Judge Stewart reneged on an agreement to permit such a defense.

Vesco & Co.'s contention in this regard distills down to the argument that, as an entity against which ICC intended to enforce any judgment obtained against Vesco, it had the right to defend the ICC action on Vesco's behalf, thus relieving Vesco of the obligation of appearing and subjecting himself to all of the obvious consequences which would result from such an appearance. Contrary to its assertion that it sought this right "from the outset" (Petition, p. 10), Vesco & Co. first took this position in a memorandum submitted prior to the inquest held on May 22, 1974. Prior to that time, the emphasis was entirely upon whether Vesco & Co. would be permitted to present evidence as to whether Vesco & Co. was "a creature of Robert Vesco" and "from the outset" Vesco & Co. was given the opportunity to submit evidence in this regard (R9a).

Throughout its petition Vesco & Co. charges that Judge Stewart reneged on a promise of a full hearing on the merits of ICC's claim against Vesco. This simply is not so. A reading of even those portions of the transcripts included in petitioner's appendix demonstrate that the full hearing "on the merits" to which Judge Stewart was referring concerned only the alter ego questions (27a-28a, 32a-33a, 35a, 37a).

Vesco & Co. cites no authorities whatever in support of its contention that it should be permitted to defend ICC's action on Vesco's behalf. However, even though the Court of Appeals presumedly did not reach that issue on Vesco & Co.'s appeal from the August 22, 1975 order, it necessarily decided that question when it affirmed the District Court's denial of Vesco & Co.'s motion to intervene in yet another action commenced against Vesco by ICC and in which Vesco & Co. was not a named defendant. There, in seeking to intervene, Vesco & Co. advanced its essentially boot strap argument that, since it had been found for the purpose of preliminary injunction to be Vesco's alter ego, it should be entitled, as his alter ego, to intervene and defend on his behalf.

In its brief to the Court of Appeals Vesco & Co., on its prior appeal (as well as on its appeal in the other action referred to above), cited a number of suretyship cases in support of its argument that it should be entitled to defend this action on the merits for Vesco. There is, however, absolutely no basis for analogizing the instant case to the suretyship situation. Vesco & Co.'s position is quite different from that of a surety who would have an *in personam* liability on the underlying claim payable out of its *own* property irrespective of whether it was holding property of its principal. Vesco & Co. stands in no such position. As it relates to the present situation, Vesco & Co.'s only involvement is that of a holder of assets which belong

to Vesco which are subject to the claims of ICC as Vesco judgment creditor.

II. The issues raised but left undecided on Vesco & Co.'s prior appeal do not warrant the granting of the extraordinary relief requested herein.

1. The alleged defect in the form of judgment.

Vesco & Co. urges that the original default judgment and the May 26, 1976 amended judgment are "unclear, confusing and uncertain" on their face because it is "impossible to determine what matters and portions of the pleading have been disposed of and what remains for further proceedings" (Petition, p. 17). Of course, to the extent this argument relates to the amended judgment, it was not raised on Vesco & Co.'s prior appeal in that the amended judgment was entered in response to the Court of Appeals' remand on that prior appeal.

In addition, Vesco & Co.'s argument in this regard cannot be taken too seriously in view of the fact that it did not even deem it necessary to include the complaint and the amended complaint in its appendix. However, we note that Judge Stewart in his most recent decision expressly rejected Vesco & Co.'s contention, finding that "[a]ll the proceedings and ensuing judgments against Vesco have clearly and consistently been based on, and related back to, the original, not the amended, complaint" (R5a) and that the "judgment is 'comprehensible' on its face" (R8a).

Similarly Judge Stewart, contrary to Vesco & Co.'s argument that no determination has been made as to whether the amended complaint was properly served on Vesco (Petition, p. 17), expressly found that the amended complaint had not been properly served on Vesco (R7a).*

* At page 11 of its petition, Vesco & Co. also states that "[t]here has been no finding at any time that the amended complaint was properly served on Robert Vesco." Technically this is correct in that Judge Stewart made a contrary finding.

2. The Alleged effect of the Amended Complaint on the Complaint.

Arguing that "the original complaint is completely superseded" by the amended complaint, Vesco & Co. asserts that the "default judgments, based upon an abandoned complaint, is facially void and ineffective" (Petition, pp. 18-19). First, as previously noted, page 4 fn., supra, this argument was, by implication, rejected by the Court of Appeals on Vesco & Co.'s prior appeal. Second, it was expressly rejected by Judge Stewart in his October 27, 1976 decision. In doing so, Judge Stewart noted that Vesco & Co. participated in proceedings on the default judgment for a long period of time—over two years—before raising this technical objection (R5a).

3. Vesco & Co. claimed right to be heard on the merits of the ICC's claim against Vesco.

This contention has been answered above. See pp. 6-8, supra. As noted Vesco & Co. offers no authorities in support of its argument that that one holding assets of a judgment debtor has a right to question the merits of the judgment creditor's claims against the judgment debtor.

4. The Finality of the Judgment.

Here Vesco & Co. argues that there is a question as to the propriety of the entry of a final judgment against but one alleged coconspirator. However, the Court of Appeals necessarily rejected this argument when it remanded the prior appeal to the district court. There would have been no need to remand for a determination as to what claims had been finally determined if the Court thought that the entry of a final judgment violated the rule set down in *Frow* v. *DeLaVega*, 82 U.S. 552 (1872).

5. The Alter Ego Finding.

Suffice it to say on this point that the evidence submitted by ICC at the alter ego hearing was anything but "skimpy" (Petition, p. 20). In this regard, we respectfully refer the Court to Judge Stewart's August 22, 1976 decision which outlines some of this evidence (18a-24a).

6. The Propriety of Entering the Amended Judgment

Clearly, Vesco & Co. lost its right to question the propriety of the *nunc pro tunc* aspect of the amended judgment when it failed to prosecute its appeal from that judgment in a timely fashion.

In any event, it is, we respectfully suggest, clear that the entry of the amended judgment *nunc pro tunc* was entirely proper. The phrase "*nunc pro tunc*" is merely "descriptive of the inherent power of the court to make its record speak the truth—to record that which was actually done but omitted to be recorded." *A.B.C. Packard, Inc.* v. *General Motors Corporation*, 275 F.2d 63, 75 (9th Cir. 1960); *W. F. Sebel Co.* v. *Hessee*, 214 F.2d 459, 462 (10th Cir. 1954). In entering the amended judgment *nunc pro tunc*, Judge Stewart was merely confirming, in response to a question raised by the Court of Appeals, that the original July 12, 1974 judgment was final in certain respects and should have contained the Rule 54(b) certification.

Of course, it is obvious why Vesco & Co. would want the *nunc pro tunc* portion of the amended judgment stricken. Such a result might well negate all of ICC's efforts over the past two years in attempting to reach the assets of Vesco & Co.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the extraordinary writs sought should be denied.

Respectfully submitted

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APPENDIX

Memorandum Decision of the Honorable Charles E. Stewart, Jr., Filed October 27, 1976.

STEWART, DISTRICT JUDGE:

On May 27, 1976, an amended judgment was entered in this action in response to a May 13 remand from the Court of Appeals due to the absence of a Rule 54(b) of the Federal Rules of Civil Procedure ("F.R.Civ.P.") certification of finality in our July 16, 1974 judgment. Defendant Vesco & Co., Inc. ("Vesco & Co.") filed its notice of appeal from this amended judgment on July 7, 1976, nine days late. On August 4, 1976, plaintiff moved in the Court of Appeals to dismiss the appeal as untimely. Defendant then moved before this court on August 31, 1976 pursuant to Rule 4(a) of the Federal Rules of Appellate Procedure ("F.R.App.P."), for an extension of the time in which to file a notice of appeal on the ground of excusable neglect. On September 14, the Court of Appeals heard plaintiff's motion to dismiss and a cross-motion by defendant that the May 13 remand be reconsidered. The motion to dismiss was granted and the motion to reconsider denied. On September 15, the defendant moved this court to vacate the May 27, 1976 judgment pursuant to Rule 60(b) of the F.R.Civ. P. A hearing was held on both of the motions pending before this court on September 22, 1976, and a further conference was held on October 7 after which the parties submitted additional papers.

Plaintiff, in opposition, initially argues that defendant's motion to extend the time in which to file a notice of appeal should be dismissed because the motion was not made within 60 days after entry of the judgment appealed from, as required by Rule 4(a). The Second Circuit, confronted with this very argument, recently held that

> "the filing of the notice of appeal within 60 days, coupled with a prima facie showing of excusable ne-

> glect, and the timely service of the notice of appeal on the opposing parties, constituted a sufficient manifestation on the part of appellants to permit the district court, in the exercise of its discretion, to treat the notice of appeal as the substantial equivalent of a motion to extend the time because of excusable neglect." *Stirling* v. *Chemical Bank*, 511 F.2d 1030 (2d Cir. 1975).

In the instant case, defendant filed, and served plaintiff with, its notice of appeal within 60 days of the judgment, and made a prima facie showing of excusable neglect. Thus we will exercise our discretion "to treat the notice of appeal as the substantial equivalent of a motion," and consider the substance of the motion.

First, defendant claims that it did not know that the judgment was entered on May 27, 1976. Defendant admits that its attorney saw the order signed on May 26 (Littman Affidavit ¶ 3). Defendant apparently thought that the prevailing party entered a judgment, and that this party mig' delay entry so as to put off "the inevitable" appeal (Littman ¶ 3). Defendant was entirely mistaken about the procedure in the federal courts where a signed order is sent directly from chambers to the clerk's office where it is entered in the docket shortly thereafter. See Rules 58(2) and 79(a) of the F.R.Civ.P. Ignorance of the court's procedures is not "excusable neglect." *Russo* v. *Flota Mercante Grancolombiana*, 303 F. Supp. 1404 (S.D.N.Y. 1969); *Nichols-Morris Corp.* v. *Morris*, 279 F.2d 81 (2d Cir. 1960).

Second, defendant claims that it was not notified by the clerk's office of the entry of judgment as required by F.R.Civ.P. 77(d). This is contradicted by the notation "m/n" in the docket following the entry of the judgment on May 27, 1976. This notation is used by the clerk's office to indicate that notice has been mailed to the parties (Camhy Affidavit ¶ 4). Even if notice were not mailed by

the clerk, Rule 77(d) specifically provides that "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure," where the sole ground for relief is "excusable neglect." In this case, but for defendant's apparent ignorance of the federal procedures for entry of judgment, it would have known that entry would immediately follow signing of the order, and a routine check with the docket clerk would have informed it that this procedure had been followed. We also note that notice of the order appeared in the June 8, 1976 issue of the New York Law Journal. Thus, even if defendant did not receive notice from the clerk's office, it should have known independently that the order was entered, so any failure on the part of the clerk's office is not "excusable neglect." See *Nichols-Morris, supra* at 83.

Finally, on June 24, 1976, five days before the 30-day time to appeal had expired, defendant was informed by the Court of Appeals Clerk, Daniel Fusaro, that the amended judgment had been entered on May 27, 1976 *and* that the previous appeal had been disposed of by the Court of Appeals by its May 13, 1976 remand. Defendant did not file notice within this five-day period although it indicated that it intended at all times to pursue the appeal (Littman ¶ 11). Its only explanation for not filing is that it was "in a quandary . . . as to the proper avenue for further proceedings" (Defendant's August 30 Memorandum p. 5). However confusing the procedural posture of the case may have been earlier, we think that the Fusaro letter made it clear that defendant would have to institute a new appeal in order to have the Court of Appeals consider the other issues that defendant had raised, but which the Court of Appeals had not reached because of its decision to remand. Thus, we

must conclude that defendant's failure to act was the result "of one of those careless omissions to which everyone is indeed subject, but which do not excuse inaction." *Nichols-Morris, supra* at 83.

Accordingly, we deny defendant's motion to extend the time in which to file a notice of appeal.

In the alternative, defendant has moved on several grounds that the judgment be vacated pursuant to F.R.Civ.P. 60(b). Admittedly, defendant's primary interest in this relief is that it would give defendant a chance to pursue a timely appeal upon entry of a corrected judgment.

Defendant's main argument here rests on its contention that the May 27, 1976 judgment is void because it refers only to the original complaint, and not to the amended complaint which had been filed before the default against Robert L. Vesco ("Vesco") was entered.

A brief chronology of the key events relating to this claim is as follows. The original complaint was filed on June 7, 1973 and Vesco was served with summons and complaint on July 30, 1973. An amended complaint was filed on September 7, 1973 and service was purportedly made on Vesco on October 24 and 25, 1973. In the meantime, on October 5, 1973, a default judgment was entered against Vesco on the original complaint. Pursuant to this default judgment, an inquest on damages was held which resulted in our July 16, 1974 judgment awarding plaintiff $2,188,345.93. On April 4, 1975 an amended judgment was entered certifying the finality of the October 5, 1973 and July 16, 1974 judgments. The April 4 amended judgment was itself amended on September 15, 1975 in order to correct an error as to the date of the July 16, 1974 judgment. Plaintiff sought to satisfy some of its outstanding default judgments against Vesco through certain assets of Vesco & Co., and on August 22, 1975 this

court held that Vesco & Co. was the alter ego of Vesco. Vesco & Co. filed its notice of appeal on September 19, 1975 and on May 13, 1976, the Court of Appeals remanded to this court. Our May 27, 1976 judgment certified the finality of, and amended *nunc pro tunc,* the July 16, 1974 judgment.

All the proceedings and ensuing judgments against Vesco have clearly and consistently been based on, and related back to, the original, not the amended, complaint. Defendant apparently had no quarrel with this when it filed its brief on appeal to the Second Circuit since it attacked the default on the basis of the adequacy of service of the original summons and complaint, but never raised the point it now presses. There are in our view, therefore, substantial equitable considerations tending to suggest that defendant should not be permitted to raise for the first time at this very late hour, a procedural issue which could have been presented long ago. In any event, however, we find that defendant's contention is without merit.

The general rule is that once a pleading has been amended, and the amended pleading is complete in itself, it supersedes the original. See 3 Moore's *Federal Practice* § 15.08[7] at 939 (2d Ed. 1975); *Cicchetti* v. *Lucey,* 514 F. 2d 362 (1st Cir. 1975); *La Batt* v. *Twomey,* 513 F.2d 641 (7th Cir. 1975); *Phillips* v. *Murchison,* 194 F. Supp. 620 (S.D.N.Y. 1961). Defendant contends that the superseding effect takes place the moment the amended pleading is filed. While there is some language to this effect in some of the opinions upon which defendant relies (see *Cicchetti* and *Phillips, supra*) none of them were directly concerned with, or addressed, the issue raised by the facts of the instant case. Here the amended complaint was filed before the default judgment on the original complaint was entered, but service was not made, if at all, until after entry of the default judgment. Under these circumstances, plaintiff contends that the mere filing of the amended complaint

should not be held to have caused the original complaint to be superseded.

The relationship between filing and service of a complaint in the first instance is that filing properly commences the action, but

> . . . commencement is merely the threshold to litigation; unless it is ultimately followed by proper service of original process, or defendant waives proper service, the potential jurisdiction which commencement invokes never ripens into actual jurisdiction. 2 Moore's *Federal Practice* § 4.08 at 1024-5 (2d Ed. 1975).

We think that when an *amended* pleading is required to be served on a party, it similarly requires proper service in order to become effective as to this party. Thus, we conclude that if service is not, or cannot, be made of the amended pleading, it does not supersede the original. The question to be determined, therefore, is whether Vesco was properly served with the amended complaint.

Pursuant to Rule 4(i)(1)(E), service of the amended complaint was authorized by this court, on October 19, 1973, to be made as follows:

> (i) by any method of service of process authorized by Rule 4 of the Federal Rules of Civil Procedure; or (ii) as to individual defendants, by leaving a copy of the summons and amended complaint herein upon the premises of such defendant's last known residence located in Nassau, Bahamas and mailing a copy thereof to such defendant at either the Post Office Box of such defendant or to the address of such last known residence of such defendant in Nassau, Bahamas . . .

In light of representations recently made to this court by counsel for plaintiff as to what information was available about Vesco's whereabouts in October of 1973, the terms of

this order may not comport with the requirements of due process. See *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Milliken* v. *Meyer*, 311 U.S. 457 (1940).

However, we need not decide this since we find that the method of service outlined by James Bondi in his November 12, 1973 Affidavit of Service does not comply even with the terms of our order, in that Bondi was not able to "leave" the papers at Vesco's last known residence.

The affidavit recounted that two persons, who had been authorized to effect service, went to Nassau, Bahamas and there located the last known residence of Vesco (Bondi Affidavit ¶ 12). Two gardeners were present on the grounds of the residence, and they called a private security officer when the process servers identified themselves and stated their mission. After the security officer arrived, the process servers again identified themselves. The officer and gardeners both refused to accept the papers, and the officer took photographs of the process servers. At this point, one server threw the papers over the wall onto the grounds, but the gardeners handed them back to the officer who in turn threw them back into the process servers' car (Bondi Affidavit ¶¶ 13 and 14). While this attempt was thwarted by personnel on the grounds of this residence, there is no information that these persons were agents of Vesco, so the failure of the attempt cannot be imputed to Vesco's own efforts. Accordingly, we find that the amended complaint was not properly served and thus, that the amended complaint did not supersede the original, and that all the judgments properly relate to the original complaint.

Defendant's second ground for seeking to open the judgment is that the May 27, 1976 judgment "on its face, does not make sense" (Besser letter of September 15, 1976), if

its references to the various counts of the complaint are read as relating to the original complaint. We have carefully compared the counts of the complaint and those enumerated in the May 27, judgment, and we conclude that the references in the judgment are accurate. Thus we find that the judgment is "comprehensible" on its face.

Finally, defendant seeks to vacate the May 27 judgment on the ground that the reference to a judgment having been entered on July 12, instead of July 16, 1974, was incorrect. We think that this ground is not sufficiently substantive to merit our opening the judgment especially in view of the entire context of this motion.

Accordingly, we deny defendant's motion to vacate the judgment under Rule 60(b), as well as defendant's motion for leave to extend the time in which to file a notice of appeal.

So ordered.

s/s Charles E. Stewart Jr.
United States District Judge

Dated: New York, N. Y.
October 27, 1976.

Excerpts From Transcript of Proceeding Before The Honorable Charle E. Stewart, Jr., Dated July 9, 1973.

The Court: What specifically would you like me to do?

Mr. Orloff: Specifically what I would like your Honor to do in the first instance is to reconsider and vacate those findings and conclusions as your own.

The Court: As against Vesco & Co., Inc.?

Mr. Orloff: Yes, I am only speaking for Vesco & Co.

The Court: Let me interrupt you for a moment, Mr. Orloff.

We didn't have an evidentiary hearing, as you well know. I concluded, on the basis of material which is before me, material which you didn't have an opportunity to deal with, at least not fully, that Vesco & Co., Inc., was at least for purposes of temporary relief a creature of Robert Vesco.

Now, if you want an opportunity to present evidence on that question, I think I would be inclined to give you the opportunity to do so. My inclination I will not state, I will give you the opportunity to do so.